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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CALIFORNIA LAW ENFORCEMENT ASSOCIATION,

Plaintiff and Respondent,

v.

SHANE TALBOT, Individually and as Chair
and Trustee, etc. et al.,

Defendants and Appellants.

C045618

(Super. Ct. No.
01AS07268)

This case revolves around the meaning of a prior opinion of this court. In reversing a judgment of dismissal following a successful special motion to strike under Code of Civil Procedure¹ section 425.16, this court ordered that plaintiff California Law Enforcement Association (CLEA) "shall recover its costs and attorney fees on appeal. (§ 425.16, subd. (c); Cal. Rules of Court,² rule 27(a).)" (*California Law Enforcement*

¹ All further statutory references are to the Code of Civil Procedure.

² All further rule references are to the California Rules of Court.

Association v. Talbot (May 2, 2003, C041136) p. 22 [nonpub. opn.] .) Not surprisingly, CLEA interpreted this directive to mean this court had already decided it was entitled to a fee award and made a motion in the trial court to determine the amount of the award. Defendants opposed CLEA's motion, contending the trial court first had to determine whether CLEA was entitled to a fee award at all under subdivision (c) of section 425.16 (hereafter section 425.16(c)), before determining the amount of any such award.³

The trial court sided with CLEA, concluding this court had already decided CLEA was entitled to its attorney fees on appeal, and the only issue before the trial court was the proper amount of the fee award, which the court found to be \$77,403.

On defendants' appeal from that award, we conclude this court erroneously awarded CLEA its attorney fees on appeal in the prior opinion without first determining whether CLEA was actually entitled to those fees under section 425.16(c). Although the trial court was bound to follow this court's premature determination that CLEA "shall recover its . . . attorney fees on appeal" as the law of the case, we are not so bound. Because it would be unjust to allow CLEA to recover more than \$77,000 in attorney fees without any court first determining whether CLEA is entitled to those fees under section

³ As we shall explain, attorney fees are recoverable under section 425.16(c) by a prevailing plaintiff like CLEA only if the special motion to strike was "frivolous" or "solely intended to cause unnecessary delay."

425.16(c), we decline to treat this court's prior decision as the law of the case and will reverse the order awarding attorney fees on appeal to CLEA. On remand, if CLEA chooses to seek its attorney fees on appeal pursuant to section 425.16(c), then the court shall determine whether CLEA is entitled to a fee award under that statute and, if so, the amount of that award.

FACTUAL AND PROCEDURAL BACKGROUND

We take the following facts from this court's prior unpublished opinion in this case. (*California Law Enforcement Association v. Talbot, supra*, C041136.) "The California Law Enforcement Association (CLEA) is a nonprofit peace officer benefit and relief association. It is regulated by the California Department of Insurance to provide long-term disability plans to public service organizations in California. CLEA'[s] members include 19,000 peace officers in more than 140 member organizations.

"The Insurance and Benefits Trust (IB Trust) is a voluntary employee benefit association. The IB Trust provides death, sickness, accident, and other benefits to members of the Peace Officers Research Association of California (PORAC). PORAC is a not-for-profit labor organization. There are 660 PORAC member associations which in turn represent over 51,000 individuals. One of the IB Trust's benefit plans is a long-term disability benefit plan that directly competes with CLEA's plan.

"In June and July 2001, two articles by the IB Trust were published in the PORAC Law Enforcement News. Monthly, PORAC publishes and distributes over 47,000 copies of this newsletter.

"The June 2001 article was entitled *LAPPL exits CLEA CLEA LTD refuses to pay benefits*. According to CLEA, the article falsely stated CLEA failed to pay benefits, CLEA improperly increased premiums, and CLEA was not regulated by the Department of Insurance.

"The July 2001 article was entitled *CLEA resorts to the use of fraud*. According to CLEA, the article falsely stated CLEA utilized fraudulent misrepresentations to solicit customers.

"After seeking retractions from the IB Trust and PORAC, CLEA sued the IB Trust and its trustees asserting a single cause of action for libel.

"The trial court granted the IB Trust's^[4] special motion to strike the CLEA's complaint pursuant to section 425.16. The trial court concluded the IB Trust established the complaint fell within the protection of the anti-SLAPP statute and CLEA failed to meet its burden of showing a probability of prevailing on its claim." (*California Law Enforcement Association v. Talbot, supra*, C041136 at pp. 1-3.)

On CLEA's appeal, this court concluded section 425.16 does not apply "to a defamation action arising out of defamatory commercial speech by one competing purveyor of long-term disability insurance about another" "because the commercial speech of two competing long-term disability insurance providers is not an issue of public interest." (*California Law*

⁴ Hereafter, we shall refer jointly to all defendants as the IB Trust.

Enforcement Association v. Talbot, supra, C041136 at pp. 1, 8.) Accordingly, this court reversed the judgment in favor of the IB Trust. (*Id.* at p. 22.) In its entirety, the court's disposition of the appeal was as follows: "The judgment is reversed. CLEA shall recover its costs and attorney fees on appeal. (§ 425.16, subd. (c); Cal. Rules of Court, rule 27(a).)" (*Ibid.*) Nowhere else in the opinion did the court address the issue of attorney fees, nor did CLEA ever request an award of attorney fees on appeal from this court.

Following remand, CLEA filed a motion in the trial court to recover more than \$80,000 in attorney fees on appeal from the IB Trust. CLEA argued it was entitled to its attorney fees based on the disposition of the appeal, and the only question before the trial court was the amount of the award. According to CLEA, this court "found CLEA's position so convincing that it reversed the trial court's Judgment of Dismissal, re-instated the case, and ordered that CLEA be awarded its attorneys fees on appeal, even though CLEA did not seek its fees on appeal." CLEA contended the "determination that attorneys' fees, among other costs, should be awarded to CLEA as prevailing party on appeal" was "a done deal" that was "not subject to second-guessing by the trial court."

The IB Trust disagreed, arguing that "[i]n awarding attorney's fees to the [CLEA], the Court of Appeal was merely granting the trial court the authority necessary to hear a motion for attorney's fees." The IB Trust contended it was up to the trial court to determine, pursuant to section 425.16(c),

whether attorney fees should be awarded to CLEA at all and, if so, the amount of those fees.

The trial court rejected the IB Trust's arguments and awarded CLEA \$77,403 in attorney fees, concluding: "The court of appeal's decision, as well as the remittitur, explicitly award plaintiff its attorney fees on appeal. This court is unaware of any authority, and defendant cites none, which would permit this court to overrule the court of appeal's decision. Defendant could have, but apparently did not, seek rehearing."⁵

The order awarding CLEA its attorney fees on appeal was filed on October 21, 2003. This timely appeal followed.

DISCUSSION

The IB Trust contends the trial court should not have awarded CLEA its attorney fees on appeal without first determining whether CLEA was entitled to an award of attorney fees under section 425.16(c). We find no error in the trial court's action. Nevertheless, we conclude it would be unjust to treat this court's prior decision as the law of the case on CLEA's entitlement to its attorney fees for the prior appeal. Accordingly, we will reverse the order awarding CLEA its attorney fees on appeal.

⁵ The trial court correctly refused to "overrule" the decision. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction".])

I

Basis Of Award Of Attorney Fees

We start with the basic rule. "In California, we follow the 'American rule,' which means everybody pays their own [attorney] fees unless they agree otherwise or are entitled to claim the benefit of a statutory or judicially created exception." (*Burnaby v. Standard Fire Ins. Co.* (1995) 40 Cal.App.4th 787, 796.) There is no evidence in this case of any agreement between the parties providing for the recovery of attorney fees. Accordingly, any right CLEA may have had to recover its attorney fees on appeal from the IB Trust must rest in a "statutory or judicially created exception" to the American rule.

The IB Trust takes the position that the relevant statute here is section 425.16(c). That statute provides: "In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (§ 425.16, subd. (c).) Thus, under section 425.16(c), a defendant who successfully *makes* a special motion to strike is automatically entitled to an award of attorney fees. (See *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 215 ["the award of attorney fees to a defendant who successfully brings a special motion to strike

is not discretionary but mandatory”].) On the other hand, a plaintiff who successfully *opposes* a special motion to strike is entitled to an award of attorney fees *only* “[i]f the court finds that [the] motion . . . is frivolous or is solely intended to cause unnecessary delay.”

The IB Trust contends that because this court cited section 425.16(c) in its disposition of CLEA’s appeal, that statute must have been the basis for the assertion that “CLEA shall recover its . . . attorney fees on appeal,” and “[t]hose issues [under the statute] about which the appellate court was silent could only have been left to the trial court to determine.” In other words, according to the IB Trust, because CLEA was (following the appeal) a plaintiff who successfully opposed the IB Trust’s special motion to strike, and because this court did not address in its opinion whether the IB Trust’s motion was frivolous or solely intended to cause unnecessary delay, that issue remained for the trial court to resolve on remand before actually awarding CLEA any of its attorney fees on appeal.

CLEA, on the other hand, contends that despite this court’s reference to section 425.16(c) in its disposition of the appeal, the court could not actually have been relying on that statute as the basis for the assertion that “CLEA shall recover its . . . attorney fees on appeal.” According to CLEA, section 425.16(c) was “designed specifically for rulings in the trial court” and therefore could not have been the basis for an award of attorney fees *on appeal*. To explain the court’s citation to section 425.16(c), CLEA offers the following reasoning: “The

Court of Appeal's citation to the statute serves to remind that attorneys fees are, under certain conditions, awarded in trial court litigation involving [special] motions [to strike]. In other words, the Opinion's award of attorneys fees as costs on appeal is in some manner loosely tethered to the anti-SLAPP context, indicating a general basis for the Court of Appeal's exercise of discretion under the circumstances of this dispute. Such linking is simply illustrative, not required under rule of court 27 for the Court of Appeal to award attorneys fees as costs on appeal." Thus, CLEA asserts that what this court was really doing in the disposition of the prior appeal was awarding CLEA its attorney fees on appeal under rule 27, as part of the "costs . . . recoverable by the prevailing party on appeal," and the mention of section 425.16(c) was "simply illustrative."

We reject CLEA's argument. There is no authority for CLEA's assertion that attorney fees may be awarded under section 425.16(c) only for litigation in the trial court. "[T]he general principle [is] that statutes authorizing attorney fee awards in lower tribunals include attorney fees incurred on appeals of decisions from those lower tribunals." (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927; see also *People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater* (1985) 165 Cal.App.3d 378, 387 ["Where attorney's fees are authorized by statute they are authorized on appeal as well as in the trial court"].) There is nothing in section 425.16 that alters the application of this general principle to an appeal from a ruling on a special motion to strike.

CLEA suggests that a plaintiff like itself who loses a special motion to strike in the trial court, then gets that ruling reversed on appeal, "will almost never be able to successfully contend . . . that the [special] motion [to strike] . . . was frivolous" and therefore will almost never be able to recover its attorney fees from the losing defendant. Even if that is so, the fact that a fee award may be only a remote possibility in a particular instance is no basis for concluding section 425.16 was intended to provide only for the recovery of attorney fees incurred in the trial court. Under section 425.16(c) a defendant who successfully makes a special motion to strike is entitled to recover his or her attorney fees without exception, and a plaintiff who successfully opposes a special motion to strike is entitled to recover his or her attorney fees provided the court finds the motion was frivolous or solely intended to cause unnecessary delay. If an appeal is taken from the trial court's ruling, the successful party can be identified only after the appeal is resolved. If the defendant ultimately succeeds in obtaining a favorable ruling on the motion to strike, regardless of whether he or she prevailed in the trial court before the appeal was taken, then the defendant is entitled to recover attorney fees under section 425.16(c), both in the trial court and on appeal, as the "prevailing defendant on [the] special motion to strike." (§ 425.16, subd. (c).) Similarly, if the plaintiff ultimately succeeds in opposing the special motion to strike, then the plaintiff may be entitled to recover attorney fees in the trial court and on appeal, *if* the

motion was frivolous or solely intended to cause unnecessary delay. CLEA has offered no rational basis for construing section 425.16(c) otherwise. Thus, contrary to CLEA's argument, an award of attorney fees on appeal can be made under section 425.16(c).

Furthermore, CLEA's assertion that this court must have been awarding CLEA its attorney fees on appeal under rule 27 because CLEA was the prevailing party on appeal is meritless because rule 27 does not provide a substantive basis for an award of attorney fees on appeal. Rule 27(a)(1) provides generally that "the party prevailing in the Court of Appeal in a civil case is entitled to costs on appeal." The costs to which rule 27(a) refers, however, are those specifically set forth in rule 27(c)(1).⁶ (See *Golf West of Kentucky, Inc. v. Life*

⁶ "(1) A party may recover *only* the following costs, if reasonable:

"(A) the amount the party paid for any portion of the record, whether an original or a copy or both. The cost to copy parts of a prior record under rule 10(b)(2) is not recoverable unless the Court of Appeal ordered the copying;

"(B) the cost to produce additional evidence on appeal;

"(C) the costs to notarize, serve, mail, and file the record, briefs, and other papers;

"(D) the cost to print and reproduce any brief, including any petition for rehearing or review, answer, or reply; and

"(E) the cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral, unless the trial court determines the bond was unnecessary." (Rule 27(c)(1), *italics added*.)

Investors, Inc. (1986) 178 Cal.App.3d 313, 316 [reaching the same conclusion regarding former rule 26(c), the predecessor to rule 27(c)].) Attorney fees are not among the costs set forth in rule 27(c)(1).

CLEA contends that "[t]he initial clause of rule 27(c)(2) implicitly authorizes the Court of Appeal to order that the prevailing party on appeal receive its attorneys fees on appeal as costs." Not so. Rule 27(c)(2) provides only that "[u]nless the court orders otherwise, an award of costs neither includes attorney fees on appeal nor precludes a party from seeking them under rule 870.2." It is true rule 27(c)(2) implies an appellate court may order that the award of costs to a prevailing party includes attorney fees on appeal. This does not mean, however, that rule 27(c)(2) itself provides a substantive basis for an appellate court to award attorney fees to the prevailing party. What the initial clause of rule 27(c)(2) implies is that when a party claims the right to an award of attorney fees on appeal pursuant to a contract, a statute, or a judicially created exception to the American rule, the party may request that award from the appellate court in the first instance, and the appellate court may make that award. (See, e.g., *Harbour Landing-Dolfann, Ltd. v. Anderson* (1996) 48 Cal.App.4th 260, 264.) Even when that happens, however, the *right* to recover attorney fees does not arise from rule 27; it arises from the contract or statute or judicial exception to the American rule. Accordingly, rule 27 did not provide a

substantive basis for this court to award CLEA its attorney fees on appeal.

II

Law Of The Case

Because this court cited section 425.16(c) in its disposition of the appeal, and because CLEA has suggested no other basis on which this court could have made an award of attorney fees on appeal to CLEA, the only reasonable conclusion is that the determination by this court that CLEA "shall recover its . . . attorney fees on appeal" was based on section 425.16(c). Of course, an award of attorney fees under that statute to a prevailing plaintiff like CLEA can be made only if the special motion to strike was frivolous or solely intended to cause unnecessary delay. The IB Trust contends that because this court did not expressly make that determination in its opinion, that issue remained for the trial court to resolve on remand before actually awarding CLEA any of its attorney fees on appeal. The problem with that argument is that this court did not direct the trial court to resolve the issue, but instead stated unequivocally that CLEA "*shall recover its . . . attorney fees on appeal.*" (Italics added.) Had this court intended the trial court to determine whether CLEA was entitled to its attorney fees under section 425.16(c), presumably it would have said so. (See, e.g., *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers* (1996) 49 Cal.App.4th 1591, 1603-1604, disapproved on other grounds in *Equilon Enterprises*

v. Common Cause, Inc. (2002) 29 Cal.4th 53, 68, fn. 5.) It did not.

"When there has been a decision upon appeal, the trial court is reinvested with jurisdiction of the cause, but only such jurisdiction as is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void." (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655.) Since this court on the prior appeal did not direct the trial court to determine whether CLEA was entitled to its attorneys fees on appeal, "such a determination would have been in excess of the trial court's jurisdiction on remand and void." (*Hanna v. City of Los Angeles* (1989) 212 Cal.App.3d 363, 376, overruled on other grounds in *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564 as stated in *City of Los Angeles v. Superior Court* (1997) 57 Cal.App.4th 1506, 1516, fn. 4.)

Accordingly, we are left with the conclusion that this court erroneously awarded CLEA its attorney fees on appeal without first determining whether CLEA was actually entitled to those fees under section 425.16(c).⁷ Because the IB Trust did not challenge this court's ruling by a petition for rehearing or a petition for review, that ruling became the law of the case,

⁷ The court's error may have been due to confusion over CLEA's status in the litigation. As we have noted, a defendant who prevails on a special motion to strike is automatically entitled to an award of attorney fees under section 425.16(c).

and the trial court was bound to follow it. (See *Benson v. Greitzer* (1990) 220 Cal.App.3d 11, 14 ["If the prior appellate opinion expressly ruled . . . upon a party's entitlement to attorney's fees, the trial court is bound to follow the appellate court's expressions on the subject, under principles of law of the case"].) It does not matter that this court did not expressly decide the special motion to strike was frivolous or solely intended to cause unnecessary delay. "Where the particular point was essential to the decision, and the appellate judgment could not have issued without its determination, a necessary conclusion is that the point was impliedly decided, even though the point was not raised by counsel or expressly mentioned." (*Lindsey v. Meyer* (1981) 125 Cal.App.3d 536, 541.)

The law of the case doctrine is not absolute, however. Our Supreme Court long ago explained that the doctrine, "which is merely a rule of procedure and does not go to the power of the court, has been recognized as being harsh, and it will not be adhered to where its application will result in an unjust decision." (*DiGenova v. State Board of Education* (1962) 57 Cal.2d 167, 179; accord, *People v. Stanley* (1995) 10 Cal.4th 764, 786-787.) "Where there are exceptional circumstances, a court which is looking to a just determination of the rights of the parties to the litigation and not merely to rules of practice, may and should decide the case without regard to what has gone before." (*England v. Hospital of the Good Samaritan* (1939) 14 Cal.2d 791, 795.)

Such is the case here. It would be a misapplication of existing legal principles and unjust for CLEA to recover from the IB Trust more than \$77,000 in attorney fees on appeal under section 425.16(c), without any court actually determining whether the IB Trust's special motion to strike was frivolous or solely intended to cause unnecessary delay, as is required for a fee award to a prevailing plaintiff like CLEA under that statute. (See *People v. Stanley, supra*, 10 Cal.4th at p. 787.) Accordingly, we will reverse the order awarding CLEA its attorney fees on appeal. On remand, if CLEA chooses to seek its attorney fees under section 425.16(c), then the trial court shall determine at that time whether CLEA is entitled to an award of attorney fees pursuant to that statute and, if so, the amount of that award.

DISPOSITION

The order filed on October 21, 2003, awarding CLEA its attorney fees on appeal is reversed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 27(a).)

_____, ROBIE, J.

We concur:

_____, SCOTLAND, P.J.

_____, BLEASE, J.